

PURCHASE OF PROPERTY. Contemporaneously with the acceptance and approval of

this Lease, Tenant will have paid to Landlord the sum of One Hundred Thousand Dollars (\$100,000) which sum shall reduce by the same amount Tenant's obligation to purchase this property on or before October 30, 1998 for the sum of One Million Four Hundred Thousand Dollars (\$1,400,000), said sum being reduced by the One Hundred Thousand Dollars (\$100,000) presently being paid by Tenant so that the amount due at the conclusion of this lease would be the sum of One Million Three Hundred Thousand Dollars. If Tenant fails to purchase the property, then Landlord has the right to pursue whatever remedies it may have for a breach of contract to purchase real estate under the law of the state of Missouri. (Lease Agreement, ¶22)

The lease in question precluded the Debtor's assignment of the lease without the prior written consent of WSW, Inc. as follows:

ASSIGNMENT AND SUBLEASING. Tenant may not assign or sublease the premises without the prior written approval of Landlord, with this exception: The parties do agree that this initial lease may be assigned to a corporation owed by the lessee at the inception of this lease; provided, however, that such assignment will not affect the primary liability of lessee Michael Frierdich to the lessor. (Lease Agreement, ¶11).

The lease in question was approved by the Bankruptcy Court for the Western District of Missouri, and the Debtor entered into possession of the leased premises in October 1994. Debtor continued in possession until the Fall of 1998, operating a pasta house franchise.

In early 1998, realizing that his obligation to purchase the subject premises was fast approaching on October 30, 1998, the Debtor approached several lending institutions to obtain the money to finance the purchase of the property. The evidence submitted at trial clearly indicates that the Debtor was simply unable to come up with the financing to purchase the property. He advised WSW, Inc. that he could not perform his obligation to purchase as set forth in the Lease Agreement.

After it became apparent that the Debtor was going to be unable to purchase the Branson property, his wife, Beverly Oswald, and son, Michael V. Frierdich, Jr., expressed an interest in acquiring the property. The evidence is clear that the Debtor did not assign or transfer his purchase obligation to his wife and son. However, his wife and son were ultimately able to purchase the property from WSW, Inc. It is

apparent that WSW, Inc. was willing to sell the property to any qualified buyer at the price contained in the Lease Agreement between WSW, Inc. and the Debtor, as the real estate market in Branson, Missouri, had suffered. It was clear that the purchase price, as set forth in the Lease Agreement, was a good deal for WSW, Inc. in the Fall of 1998.

Conclusions of Law

The Trustee, as Plaintiff, filed the Complaint in this matter seeking to avoid transfer of the Debtor's interest under the 1994 Lease Agreement in the subject real estate to his wife and son, pursuant to 11 U.S.C. § 548(a)(1). Under 11 U.S.C. § 548(a)(1), it is stated that:

(a)(1) The trustee may avoid any transfer of an interest of the * debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily -

(A) made such transfer or incurred such obligation with actual, intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

(B)(i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or

(III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

Pursuant to 11 U.S.C. § 548, the Trustee, as Plaintiff, has the burden of proof by a preponderance of the evidence to prove the elements necessary to establish that the transfer in question was fraudulent.

In examining the facts of this matter, the Court finds that the Trustee has failed to meet his burden of proof in establishing a cause of action under either 11 U.S.C. § 548(a)(1)(A) or 11 U.S.C. § 548(a)(1)(B). The facts, as adduced at trial, clearly lead the Court to conclude that there was no transfer of an interest in property of the Debtor in the Fall of 1998. The Court bases this conclusion on the fact that the Debtor could not and did not assign his purchase obligation under the Lease Agreement to his wife and son. There is no credible documentation showing that there was an assignment, nor was there any evidence showing that WSW, Inc. had consented to such an assignment. The Court further finds that, unlike many lease agreements containing an option to purchase, the instant Lease Agreement contained an obligation to purchase. This being the case, the Court finds that, unlike an option to purchase, the obligation to purchase in the instant Lease Agreement was not a thing of value that was lost to the Debtor's bankruptcy estate as a result of the transaction at issue. In fact, the Court finds that the purchase of the subject real estate by the Debtor's wife and son relieved the Debtor of the obligation to purchase the real estate, and also relieved him of his exposure to a breach of contract action by WSW, Inc. Thus, even if the Court were to characterize the transaction at issue as a transfer from the Debtor to his wife and son, the Court would have to conclude that the Debtor received equivalent value for the transfer of any interest in that he was relieved from the potential of a judgment in a breach of contract action for the remaining 1.3 million dollar purchase price of the subject real estate. Under the facts as presented at trial, the Court is unable to conclude that any fraudulent intent was shown under 11 U.S.C. § 548(a)(1). Therefore, the Complaint must be dismissed with judgment entered in favor of the Defendants.

ENTERED: June 28, 2001.

/s/ GERALD D. FINES

United States Bankruptcy Judge